No. 91-2019

In the Supreme Court of the United States

October Term, 1992

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY DICKERSON,

Respondent.

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

JOINT APPENDIX

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PETITION FOR CERTIORARI DOCKETED JUNE 17, 1992
CERTIOARI GRANTED OCTOBER 5, 1992

TABLE OF CONTENTS

The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for a Writ of Certiorari:

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

December 28, 1989 - A criminal complaint was filed in Hennepin County District Court (hereinafter District Court), Minneapolis, Minnesota, charging Defendant with Possession of a Controlled Substance in the Fifth Degree.

January 31, 1990 - Defendant filed Notice of Motion and Motion to Dismiss for Lack of Probable Cause.

February 1, 1990 - State of Minnesota (hereinafter State) filed State's Memorandum in Opposition to Defendant's Motion to Dismiss.

February 20, 1990 - Pretrial evidentiary hearing held on Defendant's Motion to Dismiss for Lack of Probable Cause.

March 1, 1990 - State filed State's Supplementary Memorandum Opposing Defendant's Motion to Dismiss.

March 2, 1990 - Defendant filed Supplemental Memorandum in Support of the Motion to Dismiss.

March 8, 1990 - The District Court entered Findings of Fact, Conclusions of Law and an Order denying Defendant's motion to suppress evidence and to dismiss for lack of probable cause. The court found probable cause to believe that Defendant committed a crime.

March 13, 1990 - State and Defendant agreed to enter into a pre-plea investigation and submitted the case before the District Court for trial on stipulated facts.

May 9, 1990 - The District Court found Defendant guilty of Possession of a Controlled Substance in the Fifth Degree, deferred a finding of guilt and placed Defendant on probation.

June 4, 1990 - The District Court entered an order, dated May 29, 1990, placing Defendant on probation until May 8, 1992, and deferred any adjudication of guilt pursuant to Minn. Stat. § 152.18 (1989).

August 7, 1990 - Defendant filed Notice of Appeal to Court of Appeals in the Minnesota Court of Appeals (hereinafter Court of Appeals).

October 9, 1990 - Defendant filed Appellant's Brief with the Court of Appeals.

November 27, 1990 - State filed Respondent's Brief with the Court of Appeals.

December 11, 1990 - Defendant filed Appellant's Reply Brief with the Court of Appeals.

January 24, 1991 - Oral argument held before the Court of Appeals.

April 30, 1991 - The Court of Appeals entered a decision which reversed the District Court and found that the officer's pat search of Dickerson exceeded constitutional parameters.

May 30, 1991 - State filed a Petition for Review in the Minnesota Supreme Court (hereinafter Supreme Court) seeking reversal of the Court of Appeals' decision.

June 24, 1991 - Defendant filed a Response to State's Petition for Review of Decision of the Court of Appeals with the Supreme Court.

June 25, 1991 - The Minnesota County Attorneys Association filed a Motion to File an Amicus Brief.

July 24, 1991 - The Supreme Court entered an order granting the State's Petition for Review and denying the Minnesota County Attorneys Association's Motion to File an Amicus Brief.

March 20, 1992 - The Supreme Court entered a decision which affirmed the Court of Appeals' decision to reverse the District Court.

May 1, 1992 - The Supreme Court entered a judgment reversing the District Court judgment and sentence in accordance with the opinion.

May 6, 1992 - The District Court entered an Order Discharging Defendant from Supervision and Dismissing Complaint.

October 16, 1992 - The District Court entered an order Correcting Trial Court Record Pursuant to Minn. R. Civ. App. P. 110.05.

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

COMPLAINT AND FELONY WARRANT

No. 89-067687

CCT	SECTION/Subdivision
1	§152.025, 2(1), 3(a)

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,
Date of Birth 04-24-66

Defendant.

COMPLAINT

The Complainant, being duly sworn, makes complaint to the above-named Court and states that there is probable cause to believe that the Defendant committed the following offense(s). The complainant states that the following facts establish PROBABLE CAUSE:

Officer Pete Jackson of the Minneapolis Police Department says that he has investigated this case by reviewing the reports of other officers and by personally interviewing witnesses, and in doing so, has learned these facts:

On November 9, 1989, Officers Rose and B.S. Johnson were patrolling near 1010 Morgan Avenue North, Minneapolis, Hennepin County, Minnesota, a residence known to Minneapolis police as a "crack house". Numerous citizen complaints have been received by the police department concerning continued drug dealing at this residence. At approximately 10:15 p.m., officers saw a man, subsequently identified as defendant herein, TIMOTHY EUGENE DICKERSON, leave that house. He was walking towards the sidewalk when he looked at the squad car, changed direction and walked towards the alley of the house.

Officers stopped him and did a pat-frisk for weapons. While patting the left side of his body, Officer Rose felt a small lump in the left top nylon jacket pocket. Based on Officer Rose's experience, he knew that this lump felt like a rock of "crack" such as he had recovered during the course of searches. Officer Rose removed from the pocket a plastic wrapped object which appeared to be a "rock" of "crack/cocaine".

Minneapolis city chemist Dawn Speier says that the "rock" did indeed consist of the Schedule II Narcotic Controlled Substance "crack/cocaine", with a weight of .20 grams. After Miranda, defendant said that the crack did not belong to him, but that he was buying it for someone else.

Defendant is not in custody.

OFFENSE

Controlled Substance Crime Fifth Degree-Possession
MINN. STAT. 1989, §152.025, SUBD. 2(1), SUBD. 3(a)
PENALTY: 0-5 YEARS AND/OR $10,000

That on or about the 9th day of November, 1989, in Hennepin County, Minnesota, TIMOTHY EUGENE DICKERSON unlawfully possessed one or more mixtures containing a Schedule I, II, III, or IV controlled substance, to-wit: crack/cocaine.

THEREFORE, Complainant requests that said Defendant, subject to bail or conditions of release be:
(1) arrested or that other lawful steps be taken to obtain defendant's appearance in court; or
(2) detained, if already in custody, pending further proceedings;
and that said Defendant otherwise be dealt with according to law.
COMPLAINANT'S NAME:
PETE JACKSON /s/ PETER JACKSON
Being duly authorized to prosecute the offense(s) charged I hereby approve this Complaint.
DATE: DECEMBER 19, 1989
PROSECUTING ATTORNEY'S SIGNATURE:
/s/ CHARLES F. SWEETLAND
PROSECUTING ATTORNEY NAME/TITLE:
GAIL S. BAEZ, #40605
ASSISTANT COUNTY ATTORNEY
ADDRESS/TELEPHONE:
C2100 GOVERNMENT CENTER, 348-8595

FINDING OF PROBABLE CAUSE

From the above sworn facts, and any supporting affidavits or supplemental sworn testimony, I, the Issuing Officer, have determined that probable cause exists to support, subject to bail or conditions of release where applicable, Defendant(s) arrest or other lawful steps be taken to obtain Defendant(s) appearance in Court, or his detention, if already in custody, pending further proceedings. The Defendant(s) is/are thereof charged with the above-stated offense.

WARRANT

EXECUTE IN MINNESOTA ONLY

TO the sheriff of the above-named county; or other person authorized to execute this WARRANT; I hereby order, in the name of the State of Minnesota, that the above-named Defendant(s) be apprehended and arrested without delay and brought promptly before the above-named Court (if in session, and if not, before a Judge or Judicial Officer of such Court without unnecessary delay, and in any event not later than 36 hours after the arrest or as soon thereafter as such Judge or Judicial Officer is available) to be dealt with according to law.

ORDER OF DETENTION

Since the above-named Defendant(s) is/are already in custody;

I hereby order; subject to bail or conditions of release, that the above-named Defendant(s) continue to be detained pending further proceedings.

Bail: $5,000

This COMPLAINT - WARRANT, was sworn to subscribed before, and issued by the undersigned authorized Issuing Judicial Officer this 28th *day of* December, 1989

JUDICIAL OFFICER:

/s/ JONATHAN LEBEDOFF

Title: Judge of the District Court

RETURN OF SERVICE

I hereby Certify and Return that I have served a copy of this COMPLAINT - SUMMONS, WARRANT, ORDER OF DETENTION upon the Defendant(s) herein-named.

Signature of Authorized Service Agent:

/s/ C.R. MADRON 139

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District
Felony Division

NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant.

TO: THE COURT; THOMAS L. JOHNSON, HENNEPIN COUNTY ATTORNEY, and GAIL S. BAEZ, ASSISTANT COUNTY ATTORNEY.

NOTICE OF MOTION

PLEASE TAKE NOTICE, that on February 1, 1990 at 11:30 a.m. or as soon thereafter as counsel may be heard, before the Judge of the above-named Court, defendant, by and through his attorney, will move the Court for an order to dismiss for lack of probable cause.

MOTION

Defendant, by and through his counsel moves this Court for an order to dismiss the charge of Fifth Degree Possession of a Controlled Substance for lack of probable cause.

Respectfully submitted,

Office of the Hennepin County Public Defender
WILLIAM R. KENNEDY - Chief Public Defender

By /s/ Scott A. Holdahl
Scott A. Holdahl
Assistant Public Defender
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Minneapolis, MN, 55487
Telephone: (612) 348-6701

By /s/ Mary F. Moriarty
Mary F. Moriarty
Assistant Public Defender
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Minneapolis, MN 55487
Telephone: (612) 348-7530

DATED: this 29th day of January, 1989 [sic].

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District
Felony Division

NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant.

STATEMENT OF FACTS

On November 9, 1989, Officers Rose and Johnson of the Minneapolis police department patrolled the area near 1010 Morgan Avenue North. Complaints of drug sales in the neighborhood led the police to conclude that the residence located at 1030 Morgan Avenue North was a "crack house". At approximately 10:15 p.m., a man left the house at that address and began to walk toward the sidewalk. The officers allege that when this man saw their squad he changed direction and walked into the alley.

Officers Johnson and Rose did not know the man who emerged from 1030 Morgan Avenue North, but later identified him as Timothy Eugene Dickerson. As Mr.

Dickerson walked into the alley, Officer Johnson told his partner he wanted to stop him. The officers drove into the alley, stopped Mr. Dickerson and ordered him to place his hands on the hood of the car. Mr. Dickerson did as he was told while the officers conducted a search that revealed .20 grams of crack cocaine tightly wrapped in clear paper. Mr. Dickerson was then charged with Fifth Degree Possession of a Controlled Substance in violation of Minn. Stat. §152.025, Subd. 2(l), Subd. 3(a).

ARGUMENT

A defendant may move to dismiss a charge where "there is insufficient showing of probable cause to believe that the defendant committed the offense charged in the complaint . . . " Minn. R. Crim. P. 11.03. In determining whether to dismiss a complaint under Rule 11.03, the trial court does not simply reassess whether or not probable cause existed to warrant the arrest. Under *State v. Florence*, 306 Minn. 442, 239 N.W.2d 892 (1976), the trial court must exercise independent judgment concerning the facts disclosed by the entire record as to whether it is reasonable and fair to require the defendant to stand trial. 306 Minn. at 457.

The issue presented in this case is whether or not probable cause exists to require Mr. Dickerson to stand trial on the charge of Fifth Degree Possession of a Controlled Substance. If the police seized the crack cocaine from Mr. Dickerson in violation of his Fourth Amendment rights, the court must exclude the evidence as fruit of the poisonous tree and dismiss the possession charge for lack of probable cause.

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968), the United States Supreme Court held

that a police officer may stop an individual on less than probable cause when faced with sufficiently suspicious behavior to warrant further investigation. To justify the intrusion, the police must be able to point to specific and articulable facts which, taken together with rational inferences, would "warrant a man of reasonable caution in the belief that the action taken was appropriate." 392 U.S. at 22, 88 S.Ct. at 1880. See *State v. Goberly* [sic], 366 N.W.2d 600, 602 (Minn. 1985).

The first issue is whether Officers Rose and Johnson articulated facts sufficient to warrant the initial stop of Mr. Dickerson. The court in *State v. Lamar*, 382 N.W.2d 226 (Minn. App. 1986) articulated various factors that may justify an investigatory stop. A court may consider the defendant's criminal history only if the police were aware of this information at the time of the stop. Other factors include whether the defendant is in a place where criminal activities are fostered, whether the defendant made furtive movements, whether the defendant resisted the search, and whether the officer was in "enemy territory" when he encountered the defendant.

In *Lamar*, an undercover officer entered an "afterhours joint" that had been the subject of repeated police raids. When entering the building, the officer recognized the defendant as a convicted felon known to carry a weapon. As the officer approached the entrance to the establishment, the defendant made several furtive movements. The officer conducted a stop and search of the defendant that revealed a gun. The Court of Appeals upheld the stop and search based upon the officer's observations, and the fact that he was in "enemy territory".

The mere fact that a person is in a high crime area does not by itself justify an investigatory stop. In *Brown v. Texas*, 443 U.S. 47, 61 L.Ed.2d 357, 99 S.Ct. 2637

(1979), the police stopped the defendant in an alley known for the high incidence of drug traffic, although they suspected him of no specific misconduct. The United States Supreme Court ruled that the stop was unconstitutional because the police had no reasonable suspicion, based on objective facts, that the defendant was actually involved in criminal activity.

Justice Burger, for a unanimous Court, wrote, "In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference." 61 L.Ed.2d at 363.

It is Officer Johnson's own admission that Mr. Dickerson was stopped simply because he emerged from what the Minneapolis police perceive to be a "crack house". Although Mr. Dickerson changed direction, he made no furtive or suspicious movement. To be sure, Mr. Dickerson cooperated when the officers stopped him in the alley. Unlike the police in *Lamar*. Officers Rose and Johnson had no knowledge of a criminal record, nor did they have information that he might be carrying a weapon. The officers simply had no articulable purpose for stopping Mr. Dickerson other than the fact that he emerged from a "known crack house" in a high crime area. Since this is an improper purpose for an investigatory stop under *Brown*, the court must exclude evidence gained as a result of the search.

Assuming, for the sake of argument, that Officers Rose and Johnson did legally stop Mr. Dickerson, they had no legal right to conduct the frisk that revealed the crack cocaine. Under *Terry*, if a police officer is entitled to make an investigatory stop and has reason to fear for his safety, he may conduct a weapons search. An officer may not routinely frisk, however, he must have reason to believe,

based on articulable facts, that the suspect is armed and presently dangerous to the officer or to others. The Supreme Court's decision in *Terry* seems to imply a two-step approach. First, the officer must identify himself and make reasonable inquiry. If nothing in the initial stages of the encounter serves to dispel his reasonable fear, he is then entitled to frisk.

Officers Rose and Johnson searched Mr. Dickerson without an inquiry of any kind. They searched him immediately following the stops and discovered what was described as a "small lump" in Mr. Dickerson's pocket. This "lump" turned out to be .20 grams of crack. In their reports the officers mention no articulable fear that Mr. Dickerson might be armed, other than the fact that he had emerged from a house in which other people have been arrested carrying weapons. They noticed no bulges or other indication that Mr. Dickerson might be concealing a weapon. When they did conduct what was supposed to be a weapons search they found such a small amount of cocaine it is difficult to imagine that they could have felt a bulge at all.

Even if the stop itself was legal, the search was improper. The court must exclude the fruit of this improper intrusion on Mr. Dickerson's constitutional rights. Without this evidence, there is no probable cause to require Mr. Dickerson to stand trial on the charge of Fifth Degree Possession.

Respectfully submitted,

Office of the Hennepin County Public Defender
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By /s/ Mary F. Moriarty
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DATED: this 29th day of January, 1989 [sic].

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant.

STATEMENT OF FACTS

On the night of November 9, 1989, police Officers Rose and B.S. Johnson were patrolling near 1010 Morgan Avenue North, a residence known to Minneapolis police as a "crack house". Minneapolis police had received many citizen complaints concerning drug dealing at this residence. At approximately 10:15 p.m., officers saw a man leave the house and walk towards the sidewalk. When the man noticed the squad car, he immediately changed direction and walked towards the alley of the house.

After observing this sudden change in direction, officers stopped the man, later identified as defendant, Timothy Eugene Dickerson, and conducted a pat-frisk for weapons. Officer Rose felt a small lump in the left top

jacket pocket of the defendant. Based on Officer Rose's experience, he knew that the lump felt like a rock of "crack". Officer Rose removed the object which appeared to be a "rock" of "crack/cocaine", wrapped in a clear plastic wrapper.

Minneapolis city chemist Dawn Speier identified the "rock" as .20 grams of "crack/cocaine".

ARGUMENT

I. Police Officers' Observation of Defendant Provided an Articulable Suspicion for Stopping the Defendant.

> To lawfully stop a person for questioning, as distinct from making an arrest, a police officer must be able to point to specific and articulable facts which, together with reasonable inferences from those facts, reasonably warrant the invasion of a citizen's personal security. The intrusion cannot be based on an inarticulate hunch, and must be reasonable in light of the particular circumstances. A police officer may approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.

State v. Engholm, 290 N.W.2d 780, 783 (Minn. 1980), restating the findings of *Terry v. Ohio*, 392 U.S. 1 (1968). An investigative stop does not require conclusive proof or probable cause. "[A]ll that is required is that the stop be not the product of mere whim, caprice, or idle curiosity." *State v. Giehenrain*, 374 N.W.2d 573 (Minn. App. 1985), quoting *State v. McKinley*, 305 Minn. 297, 232 N.W.2d 906 (1975). All the facts and circumstances, including the

police officer's experience and training, are relevant to the decision to stop or detain an individual. *United States v. Cortez*, 499 U.S. 411, 418-19 (1980).

In the present case, police officers observed the defendant leaving a known "crack house". The defendant immediately changed direction as soon as he noticed the squad car. These facts, combined with the "reasonable inference an experienced police officer could draw therefrom, justifies the minimal intrusion upon defendant's rights." *State v. Baker*, 308 Minn. 204, 241 N.W.2d 476, 477 (1976).

Minnesota courts have upheld stops which were based primarily on a suspect's evasive behavior. In *State v. Gobeley* [sic], 366 N.W.2d 600 (Minn. 1985), police stopped and searched defendant when he made a "90-degree" turn after entering a store which police were searching for stolen property. In *State v. Lamar*, 382 N.W.2d 226, the defendant was searched after making a "quick movement" upon being notified that police were present. The officer testified that it was the "quick movement that focused his attention on the suspect." The Court of Appeals held that "the fact that appellant made this movement must be assessed from the point of view of a trained police officer." *Id.* at 230 (citing *Thomeczek v. Commissioner of Public Safety*, 364 N.W.2d 471, 472 [Minn. App. 1985].

Recently, the Minnesota Supreme Court upheld the conviction of a defendant stopped by a State trooper after defendant immediately pulled his truck into a driveway after making "eye contact" with the trooper. *State v. Johnson*, 444 N.W.2d 824. In *Johnson*, the court specifically rejected a rule adopted by the Court of Appeals that "an evasive act alone, without other indicia of criminal activity or extreme behavior, does not justify an investigatory stop".

Id. at 824 (citing *State v. Johnson*, 439 N.W.2d 400, 403 [Minn. App. 1989]).

In the instant case, defendant's evasive conduct upon seeing the officers and the fact defendant was observed leaving a known crack house provided a reasonable articulate basis for stopping the defendant.

II. The Circumstances Warranted a Protective Weapons Search.

Police may stop a person for questioning if there is a reasonable suspicion that the person is engaged in criminal activity, and this stop may include a weapons frisk if the officer has reason to be concerned about safety. *State v. McKissic*, 415 N.W.2d 341, 344 (Minn. App. 1987).

Weapons including guns are often seized in crack house raids. In fact, officers had previously seized both narcotics and weapons from this particular "crack house". Under the circumstances, it was reasonable for the officers to believe that a weapon might be concealed on the defendant's person. Thus, the officers acted properly in "pat-frisking" the defendant for weapons.

III. Officers had a Legal Right to Discover and Remove the Cocaine Base.

The search in the instant case can be analogized to the frisk upheld in *State v. Alesso*, 328 N.W.2d 685 (Minn. 1982). In *Alesso*, the Minnesota Supreme Court upheld the seizure of a packet of cocaine discovered by the officer during a frisk for weapons. In *Alesso*, the officer saw the defendant trying to conceal something in his pocket. Fearing it might be a weapon, the officer put his hand in defendant's pocket and pulled out a small package. In

upholding the search, the court held, "The act of reaching into the pocket and removing the contents is essentially a single act, so that it is unrealistic to require the officer to re-evaluate the available facts after putting his hand into the pocket." *Id.* at 688 (quoting 3 W. LaFave, *Search and Seizure*, §9.4(d) at page 132 (1978).

The package seized by the officer in *Alesso* was not wrapped in clear plastic. The officer had to open the package to view the contraband. The Court ruled that under the "plain view" seizure rule, if it was "immediately apparent" to the officer that the object removed, although not a weapon, was contraband, then the officer was justified in opening it." *Id.* at 689 (quoting 2 W. LaFave, *Search and Seizure*, §6.7(b) [1978]).

In the present case, the crack/cocaine was wrapped in a clear plastic wrapper. The officers did not even need to unwrap it to see that it contained crack. Once the officers pulled the package out of the defendant's pocket, it was "immediately apparent" to these experienced officers that the package contained a rock of crack/cocaine. Since it was immediately apparent to the officers that the plastic wrapper contained crack/cocaine, under *Alesso* the search and seizure was lawful.

CONCLUSION

The officers' observations of the defendant provided an articulable reason for stopping the defendant. Under the circumstances (defendant was leaving a crack house where many weapons had been seized in the past), a protective weapons search was reasonable. When the officers discovered the package, it was "immediately apparent" that the package contained cocaine. At this point, the officers had a right to seize the substance and arrest the suspect.

For these reasons, the State respectfully requests this Court to deny defendant's motion in all respects.

Dated: February 1, 1990.

Respectfully submitted,

THOMAS L. JOHNSON
Hennepin County Attorney

/s/ Gail S. Baez
Gail S. Baez
Assistant County Attorney
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Tom Jamison
Law Clerk, Criminal Div.

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

STATE'S SUPPLEMENTARY MEMORANDUM OPPOSING DEFENDANT'S MOTION TO DISMISS

No 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant.

Under the facts testified in the February 20, 1990, hearing on the above-captioned case, the State asked the court to adopt a "plain feel" doctrine, analogous to the "plain view" doctrine. The State acknowledged that there are no cases directly on point in this jurisdiction, but relies on *State v. Alesso*, 328 N.W.2d 685 (Minn. 1982) as a basis for justifying Officer Rose's removal of the crack baggie from defendant's pocket.

In *Alesso*, defendant had made a movement towards his pocket. The officer quickly brushed defendant's hand aside, reached in and grabbed what was inside the pocket. As soon as the officer pulled out the object, he saw that it was a baggie containing a package made from cigarette wrapper paper, obviously not a weapon. The court held

that the officer was entitled to open the package, notwithstanding the fact that a) the officer could see that it was not a weapon, and b) that the officer opened it because he suspected that the package contained contraband.

The Court noted that the "plain view" doctrine has three requirements: 1) prior justification for an intrusion exists; 2) the evidence must be inadvertently discovered; and 3) the incriminating nature of the object seized must have been readily apparent. The Court held that if it was "immediately apparent" to the officer that the object removed was contraband, then the officer was justified in opening up the package which did indeed contain cocaine.

In the case before the Court, Officer Rose, while conducting a lawful pat search for weapons, felt an object which he knew was crack/cocaine. He knew this based on his years of experience in arrests and searches, including searches of persons where he felt "crack" through clothing. His testimony was unequivocal that the object he had felt was that particular substance. It was "readily apparently [sic]" to Officer rose [sic] that he had discovered "crack/cocaine".

In most other cases, the "immediately apparent" issue relates to what the officer was able to see. In the instant case, sense of touch is involved. Significantly, however, the Court found it was "immediately apparent" to the officer in *Alesso* that the object, wrapped in cigarette paper, inside a baggie, was in fact contraband. It would seem that the officer in *Alesso*, relying on his sense of vision, would have less of an ability to identify an object wrapped in opaque material than Rose had when feeling pieces of crack through this nylon material.

The Washington State case to which the State referred in argument is *State v. Broadnax*, 654 P.2d 96 (Wash. 1982). As noted in the State's argument at the February

20, 1990 hearing, that case can be distinguished. In *Broadnax*, the officer conducting a pat search felt a soft bulge in defendant's pocket. The Court held that the officer simply "could not know", based on the tactile sense alone, that the bulge was a balloon containing heroin. Rejecting the claim that probable cause for arrest on which a search could be based was formulated by touching a soft bulge, the court said "a soft bulge in a shirt pocket is not alone sufficient information to find probable cause to arrest.

In the instant case, the nature of the object Officer Rose felt was not ambiguous, particularly to someone with the experience and background of Officer Rose. He recognized through sense of touch that what he had encountered was contraband, crack/cocaine.

According to the defense, Officer Rose, notwithstanding that he knew he had found crack, was just supposed to walk away from it. Such a result flies in the face of responsible law enforcement and ultimately, common sense. The better rule would be that, assuming the officers' initial stop and pat search was legal, officers to whom it seems "immediately apparent" that they have discovered contraband, are authorized thereby to conduct a search to recover it.

Respectfully submitted,

THOMAS L. JOHNSON
Hennepin County Attorney

Gail S. Baez (40605)
Assistant County Attorney
C-2100 Government Center
Minneapolis, MN 55487
612-348-8595

Dated: March 1, 1990

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District
Felony Division

SUPPLEMENTAL MEMORANDUM

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant.

TO: THE COURT; THOMAS L. JOHNSON, HENNEPIN COUNTY ATTORNEY; AND GAIL S. BAEZ, ASSISTANT COUNTY ATTORNEY

This memorandum addresses the issue of whether the rock of cocaine removed from Mr. Dickerson's pocket during a *Terry* frisk is admissible. Assuming, *arguendo*, that the stop and frisk was permissible, Officer Rose exceeded the scope necessary to protect himself and Officer Johnson by disarming a potentially dangerous man.

To support the position that the crack is admissible, the State relies exclusively on *State v. Alesso*, 328 N.W.2d 685 (Minn. 1982). In *Alesso*, the Minnesota Supreme Court upheld the seizure of a packet of cocaine discovered by an officer during a frisk for weapons. The defendant in

Alesso tried to conceal or remove an object in his pocket, leading the officer to fear for his safety. The Court ruled that the officer was justified in grabbing the object if he reasonably suspected that it might be a weapon.

The issue next addressed by the Court was whether the officer was justified in opening the legally seized package. Generally, an officer who removes a container in a weapons frisk is not permitted to open it if it is clear from observation that it is not a weapon and does not contain a weapon. Under the "plain-view" seizure rule, however, an officer may open a package if it is immediately apparent that the object removed is contraband. Since the officer in *Alesso* could see a bindle through the plastic bag, which was in plain view, he justifiably opened the package.

The key to *Alesso* is to understand that the officer was entitled to reach into Alesso's pocket because he thought Alesso was reaching for a weapon. Only after the officer had lawfully removed the package did the "plain-view" seizure rule apply.

The seizure of one rock of crack cocaine from Mr. Dickerson cannot, as the State contends, be analogized to *Alesso*. Officer Rose made no claim that Mr. Dickerson made furtive gestures or other indication that he was reaching for, or concealing, a weapon. The only reason Officer Rose gave for conducting a *Terry* frisk was knowledge that other people arrested during raids at 1030 Morgan Avenue possessed weapons. The "plain-view" doctrine is irrelevant in this case because the issue in *Alesso* was whether the officer could open a lawfully seized container.

During the Rasmussen Hearing on February 20, 1990, the Court questioned whether an officer can seize contraband found during a *Terry* weapons frisk.

In *Sibron v. New York*, 392 U.S.40, 88 S.Ct. 1989, 20 L.Ed.2d 917 (1968), the United States Supreme Court said that an officer must have constitutionally adequate, reasonable grounds before placing a hand on the person of a citizen in search of anything. In the case of a self-protective search for weapons, the officer must be able to point to particular facts from which one could reasonably infer that the individual was armed and dangerous.

The Supreme Court went on the explain that a *Terry* frisk is permissible only if its scope does not exceed what is reasonably necessary to protect the officer:

> Even assuming *arguendo* that there were adequate grounds to search Sibron for weapons, the nature and scope of the search . . . were so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched. 392 U.S. at 65-66, 88 S.Ct. at 1904.

In *State v. Hobart*, 94 Wash.2d 437, 617 P.2d 429 (1980), the Washington Supreme Court applied *Sibron* to a similar fact pattern. Although skeptical, the Court assumed that the officer had reasonable grounds to conclude that the defendant was armed and dangerous. The officer testified that he pat searched the defendant for safety purposes and that he felt two spongy objects in the defendant's shirt pocket. The Court wrote:

However, from his [the officer's] own description of the search which he made, it is evident that its scope was not strictly limited to a search for weapons, but included also an exploration of the possibility that the defendant might be in possession of narcotics. Having discovered "spongy" objects (which could not reasonably be feared as dangerous weapons) in the defendant's pockets, the officer squeezed them, with the obvious purpose of ascertaining whether they had the shape and consistency of balloons commonly used for narcotics. Such a search reaches beyond the scope permitted under the Fourth Amendment, adding to the search for weapons a search for evidence of a crime.

. . .

We are aware of no instance in which the Supreme Court has condoned the use of a "frisk" to search for evidence of an independent crime. All of its pronouncements have made it clear that such a warrantless personal intrusion is justified only to assure the safety of the officer and others. To approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons' searches as a pretext for unwarranted searches, and thus to severely erode the protection of the Fourth Amendment. Such a step this court is not prepared to take. 94 Wash.2d at 446-47, 617 P.2d at 433-34.

In *State v. Collins*, 139 Ariz. 434, 679 P.2d 80 (Ariz. 1983), the court reversed the defendant's conviction and

held that officers may not seize any and all suspicious items discovered during a *Terry* weapons frisk. Even assuming the *Terry* frisk for weapons was reasonable, the officers' invasion of the defendant's pockets to seize "soft" objects that were obviously not weapons violated the defendant's Fourth Amendment rights. 679 P.2d at 83.

The State of Arizona argued that the seizure of drugs was proper because the police, while feeling for weapons, may seize any other suspicious items. The court rejected this argument and agreed with the defendant that the Fourth Amendment does not have a "plain feel" exception. 679 P.2d at 82.

Officer Rose clearly exceeded the scope of the pat frisk allowed by *Terry*. He testified that he felt a small lump in Mr. Dickerson's pocket that he concluded was crack cocaine. At no time did Officer Rose suspect that the small lump was a weapon. Without suspicion that Mr. Dickerson was armed, Officer Rose had no legal right to unzip the pocket and remove the cocaine. Since the discovery of the cocaine is the product of an illegal search, the evidence should be suppressed.

Officer Rose's intrusion into Mr. Dickerson's pocket exceeded the scope of the *Terry* pat frisk. Minnesota has not adopted the "plain feel" rule, a doctrine that has been rejected by several states, including Arizona. Since the "plain feel" rule deals primarily with packages and containers, it would be inapplicable in this case were it the law in this state.

Respectfully submitted,

Office of the Hennepin County Public Defender
WILLIAM R. KENNEDY - Chief Public Defender

By /s/ Scott A. Holdahl
SCOTT A. HOLDAHL

By /s/ Mary F. Moriarty
MARY F. MORIARTY
Assistant Public Defenders
C2200 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-7530

DATED: this 27th day of February, 1990

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

PROBATION ORDER

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant

On May 9, 1990, *the above-named defendant entered a plea of guilty to the crime of* CONTROLLED SUBSTANCE CRIME FIFTH DEGREE - POSSESSION *and thereafter on* May 9, 1990, *defendant was placed on probation, without an adjudication of guilty under provisions of Minnesota Statute 152.18.*

And the Court being of the opinion that by reason of the character of defendant and the circumstances of this case it will be for the best interest of defendant and the best interest of justice that defendant be placed on probation for the period and upon the conditions in this Order hereinafter specified.

NOW THEREFORE, IT IS ORDERED that in accordance with M.S. 152.18 defendant is placed on

probation until May 8, 1992, *and assigned to the Hennepin County Department of Court Services for supervision.*

Said probation is granted, however, upon the express condition defendant shall observe the following order, rules and regulations:

Be truthful to your Probation Officer in all matters.
Keep your Probation Officer informed at all times of your place of residence and employment, and make no change in these without the knowledge and consent of your Probation Officer.
Do not leave the State of Minnesota without the knowledge and consent of your Probation Officer.
Report to your Probation Officer as directed.
Do not incur any financial indebtedness without the knowledge and consent of your Probation Officer.
Obey all local ordinances and state and national laws.
Comply strictly with any additional requirements that may be imposed by the Court or your Probation Officer during the term of your probation.
It is unlawful for any person convicted of a felony to possess, use or receive any firearms, Title 7, Public Law 90-618, Gun Control Act of 1968.

Participate in a Chemical Health Assessment at I.B.C.A. and follow through with all recommendations.
Enter into and successfully complete any treatment program referred to and any and all aftercare as directed by Court Services if so recommended.
Submit to random urinalysis, as directed by Court Services.
No use of any mood-altering substances.

Participate in assessment at I.B.C.A. for assistance in educational/vocational planning and follow through with all recommendations.

Should defendant violate any of the conditions herein specified, sentence may be imposed.

P.O.: /s/ Doreen N. Robinson
DATED: May 29, 1990
Telephone: 348-8080

/s/ Robert H. Lynn
Judge of the District Court

STATE OF MINNESOTA **SUPREME COURT**

JUDGMENT

Appellate Court Case Number C9-90-1780
Trial Court Case Number 89-067687

STATE OF MINNESOTA, petitioner,

Appellant,

vs.

TIMOTHY EUGENE DICKERSON,

Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment and sentence *of the Court below, herein appealed from, to wit, of the* District *Court within and for the County of* Hennepin *be and the same hereby is* reversed in accordance with the opinion *and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.*

Dated and signed: FOR THE COURT April 29, 1992
Attest: Frederick K. Grittner
Clerk of the Appellate Courts
By: /s/ D. Sobcinski
Assistant Clerk

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

ORDER DISCHARGING DEFENDANT FROM SUPERVISION AND DISMISSING COMPLAINT

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY E. DICKERSON,

Defendant

WHEREAS, the above named defendant has been under the supervision of the Bureau of Community Corrections, Felony Probation pursuant to an Order of this Court, and

WHEREAS, said Felony Probation reports that the defendant has made satisfactory progress and recommends his discharge from supervision and,

WHEREAS, the Hennepin County Attorney has recommended that this Court dismiss the Complaint on the file herein.

NOW THEREFORE IT IS HEREBY ORDERED That the defendant be discharged from supervision by the Felony Probation Division, and

IT IS FURTHER ORDERED, That the Complaint on file herein be and the same is hereby dismissed.

By the Court:

/s/ Robert H. Lynn
Judge

DATED: 4/28/92

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

ORDER CORRECTING TRIAL COURT RECORD PURSUANT TO MINN. R. CIV. APP. P. 110.05

No. 89-067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant

This matter came before the Court pursuant to a written request to correct the trial court record by Assistant County Attorney Beverly Wolfe. Attorney for Defendant, Assistant Public Defender Peter Gorman, has stated he does not oppose this request.

This request is based upon the accidental or inadvertent omission from the trial court record of two memorandums filed by Assistant County Attorney Gail Baez with this court during the pre-trial proceedings in this court.

Accordingly, IT IS HEREBY ORDERED:

1. That the attached memorandum titled "State's Memorandum in Opposition to Defendant's Motion to Dismiss," which was originally filed with this court on

February 1, 1990, be made part of the district court file in this case.

2. That the attached memorandum titled "State's Supplementary Memorandum Opposing Defendant's Motion to Dismiss," which was originally filed with this court on March 1, 1990, be made part of the district court file in this case.

BY THE COURT:
/s/ Robert H. Lynn
Robert H. Lynn
Judge of the District Court

DATED: October 16, 1992

[Attached memoranda are omitted because they appear in the preceding pages of this Joint Appendix.]